
CANADA / JUDGMENT

Dish Network L.L.C. v. Rex

2012 BCCA 161

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 161 Dish Network L.L.C. v. Rex

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dish Network L.L.C. v. Rex,

2012 BCCA 161

Date: 20120419

Dockets: CA039319, CA039330

Docket: CA039319

Between:

Dish Network L.L.C., DirecTV, Inc., and

Bell ExpressVu Limited Partnership

Appellants

(Plaintiffs)

And:

Richard Rex, Richard Rex d.b.a. Can-Am Satellites,

Richard Rex d.b.a. CanAm Satellites, Richard Rex, d.b.a.

www.smalldish.com, Susan Goodwin, Kendra Day, Deborah Wilkinson

Katalin Kupser a.k.a. Kathy Kupser, Mario Teixeira, John Doe, Jane Doe and

other persons unknown who have conspired with the named Defendants

Respondents

(Defendants)

And:

Attorney General of Canada

Respondent

(Respondent to Notice of

Constitutional Question/

Intervener)

- and -

Docket: CA039330

Between:

Dish Network L.L.C.

Respondent

(Plaintiff)

And:

Richard Rex, Richard Rex d.b.a. Can-Am Satellites,

Richard Rex d.b.a. CanAm Satellites, Richard Rex, d.b.a.

www.smalldish.com, Susan Goodwin, Kendra Day, Deborah Wilkinson

Katalin Kupser a.k.a. Kathy Kupser, Mario Teixeira, John Doe, Jane Doe and

other persons unknown who have conspired with the named Defendants

Respondents

(Defendants)

And:

Attorney General of Canada

Appellant

(Respondent to Notice of Constitutional Question)

Corrected Judgment: The name of counsel for the Attorney General of Canada was corrected on April 27, 2012

Before:

The Honourable Madam Justice Levine

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Frankel

On appeal from the Supreme Court of British Columbia, August 15, 2011

(Dish Network L.L.C. v. Rex, 2011 BCSC 1105, Vancouver Registry

Dockets S094747, S084517, S085635)

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Place and Date of Hearing:

Vancouver, British Columbia

November 10, 2011

Place and Date of Judgment:

Vancouver, British Columbia

April 19, 2012

Written Reasons by:

The Honourable Madam Justice Levine

Concurred in by:

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

- [1] This appeal is from an order requiring the appellants to pay "advance costs" to the respondent, Richard Rex, to fund Mr. Rex's constitutional challenge to Canadian laws that prohibit a person from decoding encrypted subscription television broadcasts. The constitutional challenge is founded on the premise that Canadian laws that prohibit the receipt by Canadian residents of television signals originating outside of Canada violate their rights to freedom of expression, as protected by s. 2(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter"). On the basis of the hypothetical existence of a foreign provider of signals wishing to be licensed and provide its signals directly to Canadian residents, but prevented from doing so by unconstitutional Canadian laws, the chambers judge found Mr. Rex's constitutional challenge to be of the exceptional and special nature to warrant advance costs.
- [2] Despite the chambers judge's lengthy and thorough reasons, in my opinion they afford little basis for the conclusion that Mr. Rex raised a constitutional challenge of any merit, much less one that could meet the stringent criteria for an award of advance costs. I have some difficulty following the trial judge's reasoning that led him to conclude that if there were a willing foreign provider of television signals Mr. Rex could have a Charter defence to the claims against him, and in any event, such a hypothetical case has no importance of the kind that would support an award of advance costs.
- [3] It follows that I would allow the appeal.

Background

The Litigation

- [4] The litigation underlying the advance costs order concerns the provision by Mr. Rex of so-called "grey market" services to enable Canadian residents to acquire subscriptions to receive otherwise unavailable satellite television programs broadcast by the appellants. The appellants brought statutory civil claims for damages against Mr. Rex and other respondents under s. 18 of the Radiocommunication Act, R.S.C. 1985, c. R-2 ("RCA"), as well as actions for fraud, misrepresentation and other common law claims, and obtained injunctions prohibiting Mr. Rex and other respondents from continuing their grey market businesses.
- [5] Mr. Rex filed a Notice of Constitutional Question under the Constitutional Question Act, R.S.B.C. 1996, c. 68, questioning the constitutional validity or applicability of ss. 9(1)(c), 9(1)(d), 10(1)(b) and 18 of the RCA. (These sections of the RCA, which are set out below, prohibit the decoding of encrypted signals, make it an offence to sell equipment used to decode signals, and provide a statutory action for damages.) Mr. Rex then filed an application for an order for advance costs to fund the constitutional challenge.

- [6] The Attorney-General of Canada is a party to the litigation as a respondent to the Notice of Constitutional Question.

"Direct to Home" Television

- [7] The appellants are "direct to home" ("DTH") satellite based subscription program providers. They purchase distribution rights for television programming from program providers such as networks, motion picture distributors, sports leagues, and other programming rights holders. DTH broadcasting makes use of satellite technology to transmit encrypted television programming signals to viewers. The encrypted signals may be decrypted or decoded using "receiving equipment" which may only be activated by a unique electronically coded access card. The receiving equipment and access card are available only to customers who enter into subscription contracts with the DTH provider.
- [8] Dish Network L.L.C. and DIRECTV, Inc. (the "U.S. Broadcasters") are licensed by the United States Federal Communications Commission to broadcast DTH programming in the United States and its territories, including Puerto Rico and the U.S. Virgin Islands. Other related companies broadcast to Mexico and Central and South America.
- [9] The U.S. Broadcasters are not licensed to broadcast in Canada. They do not purchase programming for distribution in Canada and do not hold copyrights and licences from content providers to sell the majority of their broadcast signals in Canada. No one has the lawful right to decode or authorize the decoding of the U.S. Broadcasters' broadcast signals in Canada.
- [10] Bell ExpressVu Limited Partnership is a limited partnership constituted under Ontario legislation. Bell purchases and offers subscriptions to Canadian residents for some of the same programming offered for sale by the U.S. Broadcasters in the United States.
- [11] Bell is a "lawful distributor" of satellite programming within the meaning of the RCA, and is licensed by the Canadian Radio and Telecommunications Commission ("CRTC") under the Broadcasting Act, S.C. 1991, c. 11.

The Grey Market

- [12] Mr. Rex offers services to Canadian residents to facilitate the unauthorized reception in Canada of the broadcast signals of the U.S. Broadcasters – the "grey market" services. The grey market operates by the provision and maintenance of U.S. addresses used by customers in Canada to represent they are receiving the signals of the U.S. Broadcasters in the U.S. The use of U.S. addresses induces the U.S. Broadcasters to activate subscriptions for Canadian residents which they would not otherwise do because they do not offer their broadcast services in Canada. The U.S. Broadcasters maintain that they will not knowingly sell subscriptions to people in Canada, and they have taken significant steps to prevent grey market activity.

- [13] In addition to providing and maintaining U.S. addresses on behalf of his Canadian customers, Mr. Rex also facilitated contact with the U.S. Broadcasters, including providing a phone dialing device which allowed the Canadian customers to contact the U.S. Broadcasters without being detected as calling from a telephone number in Canada.

Previous Litigation

- [14] Bell brought a similar action against Mr. Rex for his grey market activities in 1999. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, the Supreme Court of Canada declared that s. 9(1)(c) of the RCA, the statutory provision also in issue in this case, prohibited all decoding of encrypted programming signals, except where authorization is received from the person holding the lawful right in Canada to transmit and authorize decoding of the signal (at para. 68).
- [15] Mr. Rex raised a constitutional challenge in the *Bell ExpressVu* case when it reached the Supreme Court of Canada. The Court refused to consider the constitutional questions because there was no record, and rejected Mr. Rex's argument that Charter values should be used in interpreting the RCA. In refusing to consider the constitutional questions, the Court said (at para. 67):

It may be that, when this matter returns to trial, the respondents' counsel will make an application to have Section 9(1)(c) of the Radiocommunication Act declared unconstitutional for violating the Charter. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by Section 9(1)(c), and, if they are, whether they are justified under Section 1.

- [16] Mr. Rex continued his grey market activities until injunctions were granted in this litigation.

Statutory Provisions

- [17] The provisions of the RCA in issue are ss. 9(1)(c), 10(1)(b) and 18(1). Relevant definitions are found in s. 2.

2. In this Act,

"broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public;

"encrypted" means treated electronically or otherwise for the purpose of preventing intelligible reception;

"lawful distributor", in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;

"radiocommunication" or "radio" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3000 GHz propagated in space without artificial guide;

"subscription programming signal" means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;

9.(1) No person shall

...

- (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

...

10. (1) Every person who

...

- (b) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

...

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

...

18.(1) Any person who

- (a) holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner,

...

- (c) holds a licence to carry on a broadcasting undertaking issued by the Canadian Radio-television and Telecommunications Commission under the Broadcasting Act, or

...

may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c), (d) or (e) or 10(1)(b), in any court of competent jurisdiction, sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate.

- [18] Mr. Rex's Notice of Constitutional Question also referred to s. 9(1)(d), but that section does not appear to be in issue on this appeal.
- [19] Under s. 9(1)(c), a person is prohibited from decoding an encrypted subscription programming signal without authorization from a lawful distributor (in this case, only Bell is a lawful distributor). It is an offence, under s. 10(1)(b), to lease or sell any equipment or device under circumstances that give rise to a reasonable inference that the equipment or device has been used, or is or was intended to be used, for the purpose of contravening s. 9. The appellants claim that in carrying on his grey market activities, Mr. Rex has contravened s. 9(1)(c), contrary to s. 10(1)(b). Under s. 18, a person who holds an interest in the content of a subscription programming signal (the U.S. Broadcasters) or holds a licence to carry on a broadcasting undertaking (Bell) may sue for and recover damages from a person who engaged in conduct contrary to s. 9(1)(c) or 10(1)(b).
- [20] In addition to the provisions of the RCA that prohibit grey market activities and authorize a civil action for damages, provisions of the Broadcasting Act that govern broadcasting licensing are relevant. Under s. 9 of the Broadcasting Act, the CRTC is given the power to issue licences to carry on a "broadcasting undertaking", which includes DTH programming (see Bell ExpressVu at para. 45). Under s. 26(c) of the Broadcasting Act, the Governor in Council is empowered to issue directions to the CRTC "respecting the classes of applicants to whom licences may not be issued". In 1996, the Governor in Council issued Order in Council SOR/96-192 (repealed and replaced in substantially the same terms by Order in Council SOR/97-192) (the "OIC") that directed the CRTC that broadcasting licences may not be issued to an applicant that is a non-Canadian.
- [21] Thus, under the OIC, the U.S. Broadcasters cannot be licensed to deliver their DTH programming directly to Canadian residents. Bell is licensed under the Broadcasting Act, and is a "lawful distributor" under s. 9(1)(c) of the RCA.

[22] Mr. Rex did not challenge the OIC in his Notice of Constitutional Question.

Mr. Rex's Constitutional Argument

- [23] In his defence to the appellants' actions, Mr. Rex claimed that the provisions of the RCA on which they relied were unconstitutional. His constitutional challenge was brought on the basis that these provisions unjustifiably infringe s. 2(b) of the Charter by allegedly denying Canadian residents access to news, entertainment, and information that is otherwise available from U.S. Broadcasters. He introduced evidence that (reasons for judgment at para. 93):

Mr. Rex's customers are Canadian residents. A large number of them are ethnic and elderly and wish to maintain links with their culture and heritage. Many of those customers bought DTH programming in their native language that is not otherwise available for viewing from existing licensed providers of encrypted broadcasting signals in Canada.

[24] He asserted that the public importance of this issue, together with his impecuniosity, made this case of such exceptional importance as to justify an order for advance costs.

The Chambers Judge's Reasons

[25] In lengthy and thorough reasons for judgment, the chambers judge reviewed the background I have summarized, the legal principles governing an order for advance costs, and the nature and scope of the right to freedom of expression protected by the Charter.

[26] After reviewing the authorities in which the principles for awarding advance costs were articulated, the chambers judge identified the issues on the application for advance costs as "the litigant's financial impediments, and the merits and public importance of the litigation" (at para. 70).

Impecuniosity

[27] On the first issue, he determined that "Mr. Rex is impecunious and not able to fund the Charter challenge" (at para. 128). There was evidence that Mr. Rex was "a good candidate for bankruptcy" (at para. 131), as a result of the expenses of litigation and downturn in his business (at para. 132). He was not able to raise funds or obtain pro bono assistance to prosecute the Charter challenge (at para. 141). The chambers judge rejected the appellant's argument that Mr. Rex had not made meaningful efforts to raise money from his customers who are affected by the litigation, commenting that "whether the issues raised on a Charter challenge are a matter of public interest warranting an award of advance costs should not be determined by their popularity" (at para. 143).

Merit of the Charter Challenge

[28] The chambers judge's consideration of the merits issue is the core of his reasoning. He began his analysis with a review of the nature and scope of the Charter protection of freedom of expression, concluding that Mr. Rex's customers have no Charter right to receive the encrypted signals of the U.S. Broadcasters (at para. 183):

There is no Charter right to receive private communications that are not intended by the speaker to be received. Nor can the Charter be used to compel communications that are not intended to be received. There is no general right under s. 2(b) to access information: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.); *Yeager v. Canada (Correctional Service)*, 2003 FCA 30 at para. 65; *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269. Further, a Charter right to freedom of expression cannot be used to compel private property to be used as a

forum for expression: *Compagnie General des Etablissements Michelin v. C.A.W.* (1996), 124 F.T.R. 192 (T.D.); *New Brunswick Broadcasting Co. v. CRTC*, [1984] 2 F.C. 410 (C.A.); *Committee for the Commonwealth of Canada* [[1991] 1 S.C.R. 139].

[29] Having determined that Mr. Rex's customers have no right to receive broadcasting signals from broadcasters who do not wish to broadcast them, the chambers judge conceived of a hypothetical broadcaster who would be willing to sell DTH programming to Canadian residents if the broadcaster could be licensed in Canada (at para. 198). He found it "appropriate to consider the merits of this case, at least insofar as Mr. Rex's advanced costs application is concerned, based on that hypothetical" (at para. 199). He found it unnecessary to await the existence of an actual willing foreign broadcaster "simply to avoid the prospect of the challenge occurring on the basis of a hypothetical", because "appropriate contextual factors are in evidence", and foreign DTH providers may be disinclined to pursue a challenge to the RCA because "they are strangers to the Charter", and the challenge involves matters of Canadian culture, "matters to which they are outsiders" (at para. 201).

[30] The chambers judge refused to accept the evidence of the U.S. Broadcasters that they are unwilling to provide programming to Canadian residents, relying on statements made by judges in decisions in other cases (at paras. 203-212). He characterized Bell's role in the litigation as "stepping into the role of a private Attorney General" (at para. 213). He criticized the U.S. Broadcasters' argument that the Charter challenge was an attempt to force them to sell their signals in Canada contrary to their private, commercial interests, as misconstruing the nature of the Charter challenge, which was whether Canadian residents are deprived of their freedom of expression by virtue of s. 9 of the RCA (at paras. 223-224). He referred (at para. 227) to the "combined effect" of s. 9 of the RCA and the OIC as effecting:

... an absolute prohibition on anyone in Canada who wants to decode an encrypted signal from a foreign broadcaster because no foreign DTH broadcaster may obtain a license to broadcast DTH programming to Canadian residents even where it is authorized to do so by its copyright or license agreements.

[31] The chambers judge also rejected the argument that Mr. Rex's fraudulent activities took the case outside the protection of the Charter, stating that the "focus on the conduct of Mr. Rex and his customers ignores the question of whether the impugned legislation itself breaches the Charter" (at para. 222).

[32] In response to the appellants' argument that the RCA appropriately protects Canadian content, he suggested that if foreign broadcasters were licensed to provide DTH programming in Canada, "Canadian content could be protected by requiring them to provide the requisite amount of Canadian content stipulated by the Broadcasting Act" (at para. 237). He characterized issues of Canadian content and multiculturalism as more appropriately considered on an analysis of s. 1 of the Charter on which the parties did not make full submissions. He was able to determine however, that (at para. 241):

... the combined effect of the Order in Council and s. 9 of the Radiocommunication Act prevents Canadian residents from accessing programming related to their cultural heritage available from foreign broadcasters that is otherwise not available from licensed Canadian broadcasters.

[33] The chambers judge concluded, based on the existence of a hypothetical willing foreign broadcaster (at para. 242):

In my opinion, application of the principles from *Irwin Toy* [*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927] and *Canadian Broadcasting Corporation* [*Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19, 2011 SCC 2] demonstrates that one of the effects of s. 9 of the Radiocommunication Act is a restriction of freedom of expression. In that respect, Mr. Rex has demonstrated a *prima facie* case of merit.

Public Importance

[34] The chambers judge characterized the third part of the test for advance costs (at para. 244):

The case law referred to in these reasons demonstrates that the third condition for an advance costs award is not merely that the matter be one of public interest, but that it also rises to the level of constituting special circumstances.

[35] He found that Mr. Rex's Charter challenge raised issues of public interest that transcend his own pecuniary interests – the nature and scope of the right of freedom of expression in Canada (at para. 245) – and affect a broad segment of the Canadian population (at para. 248).

[36] He rejected the appellants' argument that the rights of Canadian residents to receive foreign language programming are satisfied by its availability on the internet. He noted that internet access to television programming is the result of "a temporary exception issued by the CRTC that may be revoked at any time" (at para. 251), and that the appellants' submissions assumed "incorrectly in my view, that all Canadian residents who wish to access foreign DTH programming know how to use the internet and that they have internet access with sufficient bandwidth to stream television programs" (at para. 255).

[37] The chambers judge found further public interest in the fact that Charter issues continue to be raised as a defence to prosecutions under the RCA (at paras. 256 and 258), and the challenge is to "one of the 'legislative pillars' of Canada's broadcasting framework, which is of national significance" (at para. 258). He concluded that the "issue will not be dealt with but for the litigation" and "[t]he outcome of the case would resolve the ongoing uncertainty in respect of the freedom of expression issue" (at para. 258).

[38] He concluded that the public interest issues to be determined in this case, "regardless of outcome", could eliminate grey market activity, costly prosecutions and litigation practices undertaken by the U.S. Broadcasters, making "the case sufficiently special" (at para. 260). He said (at para. 261):

Prosecutions should not persist if they rely upon an unconstitutional law or regulation. Foreign broadcasters should not be permitted to pursue litigation that depends upon a private cause of action that cannot be sustained. It is in the public interest that the issue be dealt with now.

[39] The chambers judge summarized his conclusion on the appropriateness of ordering advance costs for a Charter challenge based in part on a hypothetical (at paras. 263-264):

I have also considered whether it is appropriate to order advance costs where the Charter challenge is based, in part, on a reasonable hypothetical. I have considered whether reliance on a reasonable hypothetical should mean that a case lacks sufficient importance. In my opinion, the hypothetical does not detract from the special circumstances arising in this case. I have considered the hypothetical involved in this case as part of my analysis of the second and third conditions set out in *Okanagan*.

Further, counsel for the respondents have not drawn my attention to any decision where an application for advance costs was denied because the case involved a hypothetical. I see no principled basis to conclude that there should be a rule that advance cost awards should not be granted simply because a Charter challenge involves a reasonable hypothetical.

[40] During oral submissions before the chambers judge, Mr. Rex's counsel stated that he was, in effect, seeking to challenge the overall broadcasting scheme established by the Radiocommunication Act, the Broadcasting Act, and the Copyright Act, R.S.C. 1985, c. C-42, as infringing s. 2(b) of the Charter.(at para. 168). This broad challenge had not been raised in his Notice of Constitutional Question, and no further submissions were made. However, the chambers judge dealt with this broad challenge to Canada's broadcasting scheme by "narrowing" it to a challenge to the combined effect of the OIC and the RCA (at para. 288):

However, I am of the opinion that an award of advance costs should not be made to support Mr. Rex's broad challenge of the Radiocommunication Act. I hold that view because the matters of public interest arising from the evidence on this application may be addressed by resolving the narrower, limited, and more discrete challenge, i.e., the combined effect of the Order in Council and the Radiocommunication Act at significantly less expense.

[41] The chambers judge concluded that Mr. Rex had met the third condition for an award of advance costs, stating "In my opinion, the facts of this case are sufficiently special to support an order for advance costs" (at paras. 294-295).

On Appeal

[42] The appellants challenge the chambers judge's award of advance costs on multiple grounds: that Mr. Rex did not establish that he could not raise sufficient funds to finance the challenge without an order for advance costs; that a Charter challenge will not resolve the issues arising in the litigation; that Mr. Rex lacks necessary standing as a public interest litigant to be awarded advance costs; that the appellants were entitled to rely on the constitutional validity of the legislation in bringing their claims against Mr. Rex and not be

burdened with paying the costs of a hypothetical Charter challenge; and that the non-constitutional aspects of the litigation should be resolved before engaging in the constitutional questions.

- [43] I do not find it necessary to deal with all of these grounds of appeal, though I am of the view that they have some merit.
- [44] The overriding ground of appeal is that the chambers judge erred in applying the principles governing an award of advance costs, by justifying the award based on a hypothetical Charter challenge. It is simply not possible to meet the tests for an award of advance costs without demonstrating a real, not imagined, issue of extraordinary and exceptional public importance.

Discussion

- [45] The principles governing an award of advance costs were first articulated by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 ("Okanagan") and further explained in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38, 2007 SCC 2 ("Little Sisters No. 2"). The overriding principle from these cases is that an award of advance costs is rare, exceptional, and made only in special circumstances related to the public importance of the issues of the case. It is granted with caution as a last resort to protect the public interest in circumstances where the need for advance costs is clearly established, in cases where the court would be participating in an injustice to the public at large if it did not order advance costs to allow the litigant to proceed.
- [46] In *Little Sisters No. 2*, Justices Bastarache and LeBel for the majority of the Supreme Court set out the three absolute requirements that must be met (at para. 37):

The nature of the Okanagan approach should be apparent from the analysis it prescribes for advance costs in public interest cases. A litigant must convince the court that three absolute requirements are met (at para. 40):

- 1 The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.

- [47] In reasons for judgment concurred in by Charron J., McLachlin C.J.C. characterized the third criterion as requiring not only that the matter be one of public interest, but that it constitute special circumstances (at para. 88).
- [48] Despite the difference in the articulation of the third requirement, it is clear from all of the judgments in both *Okanagan* and *Little Sisters No. 2* that an order for advance costs is exceptional, and a case must be sufficiently special as a matter of public interest to warrant such an order.
- [49] The chambers judge considered the three requirements from *Okanagan*, and McLachlin C.J.C.'s characterization of the "special circumstances" requirement in *Little Sisters No. 2*, but did not properly apply them to the facts of this case.
- [50] As in *Little Sisters No. 2*, it is not necessary to consider the question of impecuniosity because the case is not special enough to merit the exceptional award of advance costs.
- [51] It is fundamentally inconsistent with the overriding principle of exceptionality for a judge to hypothesize the existence of a Charter breach of the rights of unidentified third parties to a private civil action involving commercial interests, and then justify an award of advance costs on that basis. Even if the validity of Canada's protective broadcasting policies might possibly raise some issues regarding Charter protected freedom of expression, there is no basis for concluding that the hypothetical issues engaged in this case in any way satisfy the requirement of special circumstances to order advance costs.
- [52] The chambers judge concluded early in his reasons for judgment (at para. 183) that Mr. Rex's constitutional challenge had no merit – the provisions of the RCA that prohibit grey market activities do not breach anyone's right to freedom of expression. Mr. Rex's customers have no right to receive broadcast signals from providers who do not wish to provide them for commercial and legal reasons. Mr. Rex has not identified anyone else whose rights to freedom of expression are affected by those provisions. He failed to meet the first requirement for a constitutional challenge to the RCA listed by the Supreme Court of Canada in *Bell ExpressVu* (at para. 67): that he establish "whose expressive rights are engaged".
- [53] In hypothesizing a "willing broadcaster" who could be licensed in Canada and concluding that there then would be a person whose expressive rights are engaged, the chambers judge made assumptions that were purely speculative. He had to assume, in addition to the commercial willingness of a foreign broadcaster to enter the Canadian market, the invalidity of the OIC and the non-existence of any barriers to obtaining copyrights. He then had to assume, without any explanation or authority, that it could be a breach of a Canadian

resident's Charter rights for legislation to limit the receipt of communications from a willing "expressor". Then, in order to relate the hypothetical Charter breach to Mr. Rex's defence to the civil claims against him for his grey market activities, he had to assume that the provisions of the RCA that prohibit such activities would be struck down as unconstitutional.

[54] All of this reasoning, based on hypotheses and assumptions, falls into the description in Little Sisters No. 2 of the reasons why that case did not qualify for advance costs. The majority summarized their reasons (at paras. 3-5):

The situation in the present case differs from that in Okanagan. A small business corporation is in particular engaging in litigation to gain the release of merchandise that was stopped at the border. On its face, this dispute is no different from any other one that could be initiated by the many Canadians whose shipments may be detained and scrutinized by Customs before they are allowed to receive them. But the history of this case reveals more. Understandably frustrated after years of court battles with Customs over similar issues, this corporation has chosen to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. The appellant wants its present interests, as well as its (and other importers') future interests, settled for good, and it wants to stop Customs from prohibiting any more imports until its complaints are resolved.

The question in this appeal is not whether the appellant has a good cause of action, but whether the cost of the corporation's attempt to get Customs to release its merchandise, or the costs of its broad inquiry into Customs' practices, should be borne by the Canadian taxpayer. An exceptional order such as this can be made only in special circumstances, like those in Okanagan, subject to stringent conditions and to the appropriate procedural controls. In our opinion, the appellant's application meets none of the requirements developed by the Court in that decision.

The fact that the appellant's claim would not be summarily dismissed does not suffice to establish that interim costs should be granted to allow it to proceed. That is not the proper test. Quite unfortunately, financial constraints put potentially meritorious claims at risk every day. Faced with this dilemma, legislatures have offered some responses, although these may not address every situation. Legal aid programs remain underfunded and overwhelmed. Self-representation in courts is a growing phenomenon. Okanagan was not intended to resolve all these difficulties. The Court did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action, and its decision should not be used to do so. The decision did not introduce a new financing method for self-appointed representatives of the public interest. This Court's ratio in Okanagan applies only to those few situations where a court would be participating in an injustice – against the litigant personally and against the public generally – if it did not order advance costs to allow the litigant to proceed.

[55] These reasons may be paraphrased by reference to the facts of this case:

The situation in this case differs from that in *Okanagan*. An individual engaged in a small business that contravenes federal broadcasting legislation is engaging in litigation in defence of civil claims for damages initiated by broadcasters whose encrypted subscription television signals he unlawfully provided to Canadian residents. On its face, this dispute is no different from any other one that could be initiated by many Canadians whose businesses may be affected by Canada's broadcasting laws. But the history of this case reveals more. Frustrated after court battles with the appellants over similar issues, Mr. Rex has chosen to raise a constitutional challenge, claiming the legislation he contravened should be struck down as it affects the rights of his customers to freedom of expression. Having failed to prove that his customers' rights are affected by the legislation, he enlarged the scope of the litigation to pursue a broad challenge to Canada's broadcasting laws based on a hypothetical set of circumstances under which he argued his customers' rights could be affected. Mr. Rex wants his present interests, as well as his (and other grey market providers of prohibited television signals) future interests, settled for good, and he wants to stop Canada from prohibiting him from engaging in grey market broadcasting activities and his customers from receiving the television signals of foreign broadcasters.

The question in this appeal is not whether Mr. Rex has a good defence to the civil claims against him, but whether the cost of his attempt to defend those claims, or the costs of his constitutional challenge to Canada's broadcasting laws, should be borne by the other parties to the litigation, whose businesses he is alleged to have defrauded. An exceptional order such as this can be made only in special circumstances, like those in *Okanagan*, subject to stringent conditions and to the appropriate procedural controls. In my opinion, Mr. Rex's application meets none of the requirements developed by the Court in that decision.

In this case, it is arguable that Mr. Rex's constitutional challenge could have been summarily dismissed. Even if it would not be summarily dismissed, that does not suffice to establish that interim costs should be granted to allow it to proceed. Quite unfortunately, financial constraints put potentially meritorious claims at risk every day. *Okanagan* was not intended to resolve all of these difficulties. The decision did not introduce a new financing method for self-appointed representatives of the public interest. The Court's ratio in *Okanagan* applies only to those few situations where a court would be participating in an injustice – against the litigant personally and against the public generally – if it did not order advance costs to allow the litigant to proceed.

[56] In enlarging the scope of Mr. Rex's constitutional challenge, the chambers judge justified an exceptional award in circumstances where the litigation was "purely artificial" (*Little Sisters No. 2* at para. 41). It appears that the chambers judge hypothesized a completely open broadcasting system, in which there would be no legislative limits on the receipt on television by every Canadian resident of any globally available broadcast signal. In addition, private broadcasters would not choose, for a variety of commercial reasons, not to enter into contracts to broadcast them to certain recipients, and there would be no laws prohibiting anyone from carrying on "grey market" activities to facilitate the receipt of such signals from private broadcasters who chose to restrict their own broadcasts. Litigation based on such an artificial or imagined scenario simply cannot meet the requirement of "special

circumstances".

Conclusion

[57] The chambers judge found Mr. Rex's constitutional challenge lacked merit because no Charter right of any Canadian resident to freedom of expression had been breached. He ordered advance costs based on a hypothetical scenario of foreign broadcasters willing to broadcast in Canada, adding to Mr. Rex's constitutional challenge to the provisions of the RCA in issue in this litigation a further challenge to the OIC restricting licensing of foreign broadcasters.

[58] The hypothetical litigation cannot meet the requirements of exceptionality and special circumstances to justify an order for advance costs.

[59] For these reasons, I would allow the appeal and set aside the order appealed from.

"The Honourable Madam Justice Levine"

I Agree:

"The Honourable Mr. Justice Lowry"

I Agree:

"The Honourable Mr. Justice Frankel"

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